

MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION – UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE

WATER RIGHTS SETTLEMENT

INTRODUCTION

Since 1992, the Montana Reserved Water Rights Compact Commission (RWRCC) and the United States Department of Agriculture, Forest Service (Forest Service) have been in negotiations concerning federal reserved water rights on National Forest System lands in Montana. In the fall of 2005, the RWRCC and the Forest Service hired a mediator to assist with the negotiations and have reached a proposed settlement (Compact) to present to the public.

BACKGROUND

The RWRCC was created by the Montana Legislature in 1979 to act on behalf of the State to negotiate settlement of federal reserved water right claims as part of the state-wide water adjudication. A federal reserved water right is created when an Act of Congress or a Presidential Executive Order or Proclamation sets aside federal land from the public domain for a specified purpose. This includes National Forests, National Parks, Fish and Wildlife Refuges, some BLM lands, Indian reservations, and others. The water right has the priority date of the reservation of the land, even though the water right might not be used at that time. The water right includes the amount of water necessary to accomplish the specified purpose for which the land was reserved.

By state law a negotiated settlement must be enacted by the Montana Legislature, be approved by federal officials, and go through an objection process in the Montana Water Court. After all objections are resolved, the Water Court issues a final decree for all water rights in each basin, including the reserved rights in the negotiated settlement.

The RWRCC is composed of nine members: four appointed by the Governor; two appointed by the President of the Montana Senate; two appointed by the Speaker of the Montana House of Representatives; and, one appointed by the Attorney General.

RWRCC members that are on the Negotiating Team for Forest Service issues are:

- Former state senator Lorents Grosfield, Negotiating Team Chairman
- Senator Bill Tash
- Former Park County Attorney Tara DePuy
- Chris D. Tweeten, Chief Civil Counsel, Office of the Attorney General, RWRCC Chairman.

Members of the Forest Service Negotiating Team are:

- Kathleen McAllister, Deputy Regional Forester, Missoula
- Eric Johnston and Tim Sullivan, Forest Service, Missoula
- Jody Miller and Lois Witte, Office of General Counsel, Missoula and Denver
- Jim DuBois, United States Department of Justice, Denver.

Because of the vast geographic scope of the National Forest System lands in Montana, settlement of Forest Service water rights is a very important part of completing the Montana water adjudication in a timely and cost effective way.

PROPOSED COMPACT

In general, the Compact recognizes reserved water rights for the Forest Service for administrative and emergency fire fighting uses and instream flows for the South Fork Flathead Wild and Scenic River. To resolve major differences between the negotiating parties concerning the existence, nature and extent of reserved water rights for instream flows under federal law, the proposed Compact uses state law to create numerous state-based water rights for instream flow on National Forest System lands and to set up a process for applying for additional instream flows under state law. Below is a summary of what the proposed Compact does.

Federal Reserved Water Rights.

- Recognizes a reserved water right to divert water for the Forest Service for administrative uses (such as for ranger stations, pack stock, road watering) and for emergency fire suppression. Priority date is date of the creation of the National Forest.
- Recognizes an instream flow right for the South Fork Flathead Wild and Scenic River. Priority date is October 12, 1976, the date this river was designated by Congress.

Instream Flows under State Law.

- Creates, in the Compact, instream flow water rights under state law for 77 streams and one in-place water right for a fen (wetland) all located on National Forest System lands. All of these water rights will have a priority date of 2007.
- Establishes a process that the Forest Service may use in the future to apply for additional instream flows under state law on other streams throughout the National Forest System lands in Montana. Priority date will be the date of application.
- In exchange for this state law based means of acquiring instream flows, the Forest Service will withdraw all of its claims for reserved water rights for instream flows in the ongoing water adjudication.

As part of the overall agreement, the parties have agreed to seek changes to state law that:

- Continues the ability of the Forest Service to object in the Water Court to any water right claim on or crossing National Forest System lands that adversely affects Forest Service interests.
- Coordinates state and federal permitting processes.
- Allows a change of use from an appropriation to divert or withdraw water on land owned by the Forest Service above or immediately adjacent to the National Forest boundary to an instream flow. This is primarily intended to allow the Forest Service to change irrigation and other rights to instream flow on land that it might acquire in the future.

This proposed Compact will not be finalized for presentation to the Legislature until after receiving public comment. Public comment is important in the negotiation process because it ensures that the RWRCC's and Forest Service's deliberations address the concerns of the Montana public. Public meetings are the main opportunity for the negotiating parties to inform

the public of the proposed settlement. The RWRCC and the Forest Service have scheduled numerous public meetings around Montana, and urge members of the public to attend a meeting, ask questions and make comments. Comments may also be sent to the RWRCC at 1625 11th Ave., Helena, MT 59620 or via e-mail to the RWRCC at dnrrwrcc@mt.gov, so that concerns may be addressed prior to introduction of the Compact to the Montana Legislature. Written or e-mailed comments should be sent by November 27, 2006.

